

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Connect America Fund Phase II Auction	)	AU Docket No. 17-182
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
To: Chief, Wireline Competition Bureau		

**REPLY OF WISPER ISP, INC. TO OPPOSITION OF CONEXON, LLC  
TO PETITION FOR WAIVER OF DEADLINE FOR ETC DESIGNATION**

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## SUMMARY

In its Opposition, Conexon feigns concern over Wisper's application to the Oklahoma Corporation Commission ("OCC") for designation as an ETC. But as evidenced by the procedural defects that riddle the Opposition, and the scattershot allegations spread throughout it, the Opposition is not rooted in any specific concern about Wisper's qualifications to be an ETC in Oklahoma, but instead is aimed at trying to introduce irrelevant circumstances outside the scope of the Commission's jurisdiction. When the facts surrounding the delays in the OCC's approval of Wisper's Oklahoma ETC application are properly considered, the Commission will plainly see that Conexon's campaign to discredit Wisper does not hold water. Moreover, from a practical standpoint, OCC's staff has determined on two occasions that Wisper is qualified to be designated as an ETC in Oklahoma. The Commission thus should grant the waiver request and dismiss or deny the Opposition.

As an initial, and dispositive matter, Conexon has no stake in the outcome of Wisper's waiver. Therefore, Conexon lacks standing to file its Opposition. Despite stretching for more than 20 pages, the Opposition never explains how grant of the Petition will injure Conexon, or how denial would redress any injury. Moreover, Conexon has failed to follow the correct procedure for registering its opposition to Wisper's waiver request. The Commission did not seek public input on the Petition under Section 1.925(c)(i) of its rules; therefore, the Opposition is unauthorized.

Conexon claims that Wisper failed to timely prosecute its ETC application in Oklahoma, but conveniently omits that the reason the OCC has not yet granted ETC designation to Wisper is Conexon's last-minute, unwarranted intervention before the OCC. Wisper submitted its ETC application to the OCC two and one-half months before it was required to file proof of ETC designation to the Commission. Under normal circumstances, Wisper almost certainly would

have received ETC designation in Oklahoma before the February 25, 2019 deadline. Moreover, if Wisper had filed its Oklahoma ETC application the day after release of the public notice announcing the close of the Connect America Fund (“CAF”) Phase II auction, Wisper still would have needed waiver of the deadline because of Conexon’s unjustified delay tactics.

Employing the Commission as a sounding board for a multitude of generalized grievances, Conexon invites the FCC to engage in a far-reaching fishing expedition into “each of [Wisper’s] ETC application proceedings” in several states, and to inject itself into the decision-making process of those state commissions. Obviously, under Section 214(e) of the Communications Act, those proceedings are the purview of the various state commissions. Conexon has already made its resentment well known to those commissions through filing of a surfeit of objections and lawsuits. In Oklahoma, Conexon has attacked Wisper so broadly and feverishly that the state’s Public Utility Division is now seeking to have large portions of Conexon’s direct testimony stricken from the record.

Wisper has demonstrated good cause for grant of the Petition. Its waiver request falls squarely within the waiver standard for the 180-day deadline announced by the Commission and supported by recent waiver grants to similarly situated CAF applicants. Waiver of the deadline is warranted, especially in light of the fact that the OCC will hold a hearing on Wisper’s ETC application on July 11, 2019. Grant of the Petition will ensure that Wisper will be able to implement service to thousands of unserved locations in rural northeast Oklahoma.

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**REPLY OF WISPER ISP, INC. TO OPPOSITION OF CONEXON, LLC  
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Wisper ISP, Inc. (“Wisper”), by counsel, hereby replies to the unauthorized Opposition of Conexon, LLC (“Conexon”) to Wisper’s Petition for Waiver (“Petition”) of the February 25, 2019 deadline for certifying to the Commission its designation as an Eligible Telecommunications Carrier (“ETC”) in Oklahoma.<sup>1</sup> The Wireline Competition Bureau (“Bureau”) should dismiss or deny the Opposition and grant the Petition. The Bureau also should dismiss the unauthorized and premature letter submitted by NTCA on June 19, 2019.<sup>2</sup>

Conexon’s Opposition is procedurally defective. The Commission did not solicit comments or oppositions to the Petition, which makes the Opposition an unauthorized pleading. Moreover, Conexon, a vendor that did not participate in the Connect America Fund (“CAF”) Phase II auction and has no direct interest in the outcome of Wisper’s waiver request, has no standing to contest the Petition. Conexon fails to allege any harm it would suffer if the

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<sup>1</sup> Opposition of Conexon, LLC to Wisper ISP, Inc. Petition for Waiver of Deadline for ETC Designation, WC Docket No. 10-90, AU Docket No. 17-182 and WC Docket No. 14-58 (filed June 12, 2019) (“Opposition”).

<sup>2</sup> Letter from Michael Romano, NTCA-The Rural Broadband Association to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90, AU Docket No. 17-182 and WC Docket No. 14-58 (filed June 19, 2019) (“NTCA Letter”).

Commission grants the Petition, and offers no explanation of how denial of the Petition would redress such harm. In addition, Conexon asks the Commission to exceed its jurisdiction by usurping the functions of the State of Oklahoma and other state commissions in reviewing Wisper's qualifications to be a state-designated ETC. Given these obvious defects, it can only be presumed that Conexon's objective is to put the "facts" it claims before the Commission to unfairly cast Wisper in a negative light. Once read, Conexon's Opposition cannot be unread, even though it is defective on its face.

Turning to the merits, Conexon's narrow view of the waiver standard adopted by the Commission does not hold up against recent decisions and the public interest in supporting broadband service to unserved residences and businesses in rural Oklahoma. But for Conexon's scattergun campaign to block Wisper at every turn, there is little doubt that Wisper would have received its ETC designation in Oklahoma by February 25, 2019 or within a reasonable period thereafter. And even if Wisper had filed its ETC application the day after the Commission released the auction closing public notice, it would still need a waiver as a result of the delays Conexon's harassing litigation has engendered.

Finally, Conexon's attempt to introduce matters unrelated to Wisper's Oklahoma ETC application are entirely outside the scope of this proceeding. Such a transparent effort to tarnish Wisper with extraneous and irrelevant arguments once again demonstrates Conexon's destructive motive. At bottom, it is Conexon that is discredited through its duplicity and animus towards Wisper.

### **Introduction**

Wisper was founded in September 2003 and today provides fixed wireless broadband service to more than 16,000 subscribers in rural and suburban areas of Illinois, Missouri, Oklahoma and Kansas. In many communities, Wisper is the only terrestrial broadband access

option because larger broadband providers have elected not to invest in the small communities Wisper is serving.

Wisper has grown its business both organically and by acquisition of other network operations clustered adjacent to and near existing operations, affording Wisper economies of scale and hubs for future market expansion through the CAF Phase II program. Wisper also has deployed some fiber in Missouri and Illinois. In the past three years, Wisper has invested an average of \$3.7 million per annum in capital improvements to expand and upgrade its network across states where it provides service.

Wisper was a successful bidder in the CAF Phase II auction, with winning bids totaling more than \$220 million in support across six states. In Oklahoma, Wisper's winning bids will provide almost \$6.8 million for deployment to 2,443 locations in rural areas of northeast Oklahoma. These locations are adjacent to Wisper's existing fixed wireless broadband access network. In every state except Oklahoma – Missouri, Kansas, Illinois, Arkansas and Indiana – Wisper was designated as an ETC before February 25, 2019. Commission staff is continuing to review Wisper's technical qualifications.

In Oklahoma, Wisper's efforts to obtain its ETC certification have been stymied by Conexon's relentless litigation, the essence of which is described in Wisper's Petition and the two supplements submitted to update the Bureau on the status of the Oklahoma proceedings. Nevertheless, on June 18, 2019, the Oklahoma Corporation Commission ("OCC") granted Wisper's request for a Certificate of Public Convenience and Necessity, a prerequisite to ETC designation in Oklahoma.<sup>3</sup> Just yesterday, OCC staff filed Supplemental Testimony in which it stated that "Wisper has currently met all of the requirements for designation as an ETC within

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<sup>3</sup> See Exhibit A, attached hereto.

the areas requested,” and reiterated its recommendation for approval of Wisper’s ETC application based on its “analysis of the Application, Amended Application, discovery responses, and supporting affidavit, along with the significant requirements and obligations that are inherent in the FCC’s CAF II process.”<sup>4</sup> Meanwhile, OCC staff has become so exasperated with Conexon that it is now asking for large portions of Conexon’s testimony to be stricken from the record because the testimony “far exceeded the scope of the [limited] intervention authority granted to Conexon” by “provid[ing] endless speculation as to whether Wisper is capable of meeting technical and operational requirements . . . for . . . CAF II Auction 903.”<sup>5</sup> The staff has concluded that “the basis for Conexon’s intervention is driven by a desire to litigate the legitimacy of the FCC’s selection of Wisper as a CAF II winning bidder . . . and it is a waste of Commission resources.”<sup>6</sup>

As the circumstances make clear, Conexon’s real motivation, both in the filing of its Opposition and in its ceaseless attempts to air irrelevant grievances before the OCC, is to scuttle Wisper’s deployment. Clearly, the staff of the OCC sees Conexon’s tactics for what they are. Wisper encourages the Commission to do the same. Otherwise, Conexon’s ploy will harm unserved rural customers and frustrate the Commission’s goals for the CAF II program.

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<sup>4</sup> Supplemental Testimony of Jenny Dillon for Public Utility Division (June 25, 2019) at 4, attached hereto as Exhibit B (“Dillon Testimony”).

<sup>5</sup> PUD’s Motion to Strike Certain Portions of Testimony of Jonathan Chambers (June 25, 2019) at 2 (¶4), attached hereto as Exhibit C (“PUD’s Motion to Strike”).

<sup>6</sup> *Id.* at 2-3 (¶6).



## Discussion

### I. THE OPPOSITION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED

#### A. The Opposition is Unauthorized

The Commission has established specific procedures that govern participation by non-parties in Commission decisions on petitions for waiver of a Commission rule or policy.<sup>7</sup> The Commission has broad discretion whether to accept public input in advance of making a decision on a waiver request, and has made clear that, “[f]or a waiver proceeding, the Commission may, *but does not have to*, allow the public or affected parties to submit comments.”<sup>8</sup> If the Commission determines that it does, in fact, wish to receive and consider such input, it issues a public notice in which it solicits comments from interested parties.<sup>9</sup> Whether to issue such a notice is a decision left entirely to the Commission’s discretion.<sup>10</sup> If the Commission chooses to issue a public notice, interested parties may then file comments on – including oppositions to –

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<sup>7</sup> These are codified at 47 C.F.R. § 1.925.

<sup>8</sup> *DISH Network Corporation*, FCC 18-123 (¶10) (2018) (emphasis added).

<sup>9</sup> See, e.g., *Public Notice - Wireline Competition Bureau Seeks Comment on California Department of Education Request for Waiver*, DA 17-1192 (rel. Dec. 11, 2017); *Public Notice – Wireless Telecommunications Bureau Seeks Comment on DISH Request for Waiver of AWS-4 and H-Block Emission Limits*, DA 18-813 (rel. Aug. 3, 2018) (noting that “[t]he Bureau is seeking comment on the [waiver] [r]equest pursuant to Section 1.925(c) of the Commission’s rules”).

<sup>10</sup> *Metropolitan Transportation Authority Request for Modification of Station KIVD0002*, 31 FCC Rcd. 1436, 1444 (¶ 25) (2016) (“*MTA*”) (“The Commission is not required to put a waiver request on Public Notice and has broad discretion whether or not to do so. Section 1.925(c)(i) of the Commission’s rules states ‘[t]he Commission, in its discretion, may give public notice of the filing of a waiver request and seek comments from the public or affected parties.’”); *Mobile Relay Associates Highland Wireless Services*, 31 FCC Rcd. 9604, 9606 (¶6) (WTB 2016) (the Commission “is not required to put a waiver request on public notice and has broad discretion whether or not to do so”).

the waiver request. If, however, the Commission chooses not to seek input through issuance of a public notice, non-parties are to express their opposition by filing a petition for reconsideration.<sup>11</sup>

In this instance, the Commission exercised its discretion under Section 1.925(c)(i) not to place the Petition on public notice and not to solicit input from non-parties. The Opposition and the NTCA Letter, therefore, are unauthorized and entitled to no consideration. If the Commission grants the Petition, Conexon and other interested parties adversely affected by the outcome may express opposition by filing a petition for reconsideration.

## **B. Conexon Lacks Standing to File the Opposition**

Even if Conexon's Opposition were permitted under the Commission's rules – which it is not – Conexon does not have standing to challenge the Petition. For decades, Commission decisions “have confirmed the necessity that parties seeking to participate in Commission proceedings satisfy the minimum tests [for standing] defined by the Courts.”<sup>12</sup> Conexon fails to meet even the most basic requirements for standing. It has not shown “injury in fact resulting from the challenged action.”<sup>13</sup> In fact, it has alleged no injury at all. Nor has it demonstrated a “causal link”<sup>14</sup> between grant of the Petition and any injury it might suffer, or explained how denial of the Petition would prevent or redress such an injury.

To establish standing before the Commission, “an injury must be both concrete and particularized and actual or imminent, not conjectural or hypothetical.”<sup>15</sup> Yet in the 20-plus

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<sup>11</sup> *Tektron Micro Electronics, Inc.*, 15 FCC Rcd. 4438, 4439 (¶2) (WTB 2000) (“non-parties to the [waiver] proceeding c[an] express their opposing views by filing a timely petition for reconsideration”). In a June 19, 2019 letter, NTCA-The Rural Broadband Association implies that the procedure set forth in Section 1.925(c)(i) violates the Administrative Procedure Act. NTCA Letter 1 (¶2). This is simply not the case. The rule ensures that non-parties have an opportunity to be heard – either by responding to a public notice (if the Commission chooses to release one) or by filing a petition for reconsideration.

<sup>12</sup> *Telesis Corporation*, 68 FCC 2d 696 (¶8) (1978).

<sup>13</sup> *Id.* (internal quotations and citations omitted).

<sup>14</sup> *MTA* at 1440 (¶12).

<sup>15</sup> *Id.* at 1441 (internal quotations and citations omitted).

pages of its Opposition, Conexon never once explains how grant of the Petition would injure it. In fact, Conexon never explains its interest in opposing Wisper's waiver request at all. Conexon states only that it is "engaged in the planning, design and construction of fiber optic networks,"<sup>16</sup> but fails to explain how its vocation is connected to outcome of the Petition. It claims to have been a "participant" in the CAF-II auction "through the Rural Electric Cooperative Consortium,"<sup>17</sup> but fails to explain how it "participated" or how it could have done so "through" another entity. The reality is that Conexon is a vendor, not a CAF II auction participant, and that Conexon has absolutely no stake in the outcome of the Commission's decision on the Petition. Conexon plainly lacks standing to challenge the Petition.<sup>18</sup>

**C. The Commission Lacks Jurisdiction to Resolve Issues Properly Before the Oklahoma Corporation Commission and Other State Commissions**

State commissions have primary responsibility for considering ETC designations unless they lack jurisdiction to do so.<sup>19</sup> Section 214(e) of the Communications Act places ETC determinations squarely within the jurisdiction of those respective bodies. In each of the ETC designations referenced in the Opposition, including the one currently pending in Oklahoma, state commissions have properly exercised jurisdiction. Conexon, however, would have the Commission inject itself into the decision-making process of the OCC (and other state commissions) and overrule those agencies' determinations.<sup>20</sup> According to Conexon, "[t]he

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<sup>16</sup> Opposition at 1.

<sup>17</sup> *Id.*

<sup>18</sup> Similarly, NTCA fails to explain its interest in the proceeding or how it would be injured by grant of the Petition.

<sup>19</sup> *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, 15 FCC Rcd. 12208, 12255 (2000) (¶92).

<sup>20</sup> Conversely, Conexon would have those agencies exceed their authority and re-determine "whether Wisper is capable of meeting technical and operational requirements and milestones previously established by the FCC under the processes and procedures for its CAF II Auction 903." PUD's Motion to Strike at 2 (¶4).

Commission should look closely at Wisper’s conduct in each of its ETC application proceedings.”<sup>21</sup>

Obviously, the Commission has no authority to supersede the jurisdictional responsibilities of Oklahoma (or Kansas or Missouri) or to undertake investigations into Conexon’s multitude of scattershot allegations, all of which involve or arise out of ETC designation proceedings before state commissions. Conexon has made its general opposition (and animus) toward Wisper well-known to the various state commissions, including the OCC, which has publicly demonstrated its exasperation with Conexon. Those commissions are the appropriate fora for resolution of Conexon’s various claims.<sup>22</sup>

## **II. WISPER HAS DEMONSTRATED “GOOD CAUSE” FOR GRANT OF ITS WAIVER**

Assuming *arguendo* the Bureau considers Conexon’s substantive arguments, it should nevertheless conclude that Wisper has acted in good faith and demonstrated good cause, and should therefore be entitled to a waiver of the deadline.

Conexon takes great pains to cast Wisper as the party that delayed action on its ETC application. But all of its hand-wringing cannot spare Conexon from the inescapable fact that its eleventh-hour intervention in Wisper’s ETC designation proceeding before the OCC would have forced Wisper to seek a waiver *even if Wisper filed its ETC application the day after the auction closed*. Simple math bears this out. The Commission’s rules afforded CAF Phase II auction winners 181 days – from August 28, 2018 to February 25, 2019 – to submit evidence of ETC designation. But it has been 191 days since Wisper filed its Oklahoma ETC application, and

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<sup>21</sup> Opposition at 9 n. 25. Apparently, that would entail investigations in Oklahoma “and in five other states.” *Id.* at 4.

<sup>22</sup> But not, as OCC staff has made clear, for re-litigating Wisper’s legitimacy as a CAF II winning bidder. See PUD’s Motion to Strike at 3 (¶4).

absent unforeseeable circumstances it likely will not be approved until sometime next month at the earliest. Thus, assuming no change in the ETC application process, including Conexon's intervention, if Wisper had filed its Oklahoma ETC application on August 29, 2018 – the day after the auction closing public notice was released, it would have still been unable to meet the February 25, 2019 deadline and a waiver would still have been required.

Conexon attempts to steer the Bureau to a case denying a 2015 waiver request filed by the Electric Power Board of Chattanooga ("EPBC"), arguing that "the facts of this case compel the same result."<sup>23</sup> In reality, the facts of this case are a world apart. EPBC faced a 90-day deadline for submitting proof of its ETC designation. It not only failed to meet that deadline, it failed even to file an application for ETC designation with the state of Tennessee within the 90-day window. Moreover, EPBC "provide[d] no explanation for, or defense of, its failure to submit its ETC designation."<sup>24</sup> EPBC claimed that it would keep the Commission apprised of developments related to its late-filed ETC designation with the state, but it failed to do so. In fact, EPBC "submitted no evidence that it ever even filed an ETC application" with the state.<sup>25</sup>

Unlike EPBC, Wisper did *not* fail to prosecute its ETC designation application before the time period for submitting ETC designation documentation to the Commission had expired. In fact, Wisper filed its ETC designation application with the OCC two and one-half months before it was required to file proof with the Commission, consistent with its understanding of typical timelines for ETC cases. Moreover, when it sought a waiver of the February 25, 2019 deadline by filing the Petition, Wisper provided a comprehensive explanation of the facts and circumstances related to its request, and documented its good faith efforts to secure ETC

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<sup>23</sup> Opposition at 5, citing *Connect America Fund, Rural Broadband Experiments*, 31 FCC Rcd 853 (2016) ("Chattanooga Order").

<sup>24</sup> *Chattanooga Order* at 854 (¶4).

<sup>25</sup> *Id.*

designation from the OCC. Since then, it has filed two supplements to the Petition with the Commission, explaining subsequent developments in its proceeding before the OCC, and has provided a copy of the OCC's order that established a procedural schedule.<sup>26</sup> As noted above, Wisper recently obtained its Certificate of Public Convenience and Necessity from the OCC. The final task for the OCC is to approve Wisper's ETC application, as its staff has recommended.<sup>27</sup>

Conexon conveniently omits all of these facts from its Opposition, claiming instead that because EPBC filed its application with Tennessee "103 days" after public notice (assuming the application was ever filed, which the Commission doubted), and Wisper filed its application with Oklahoma "111 days" after public notice, Wisper is entitled to the same denial of its waiver request that befell EPBC. Clearly, Conexon cannot see the forest for the trees. By its certification deadline, EPBC had not even filed an ETC designation application. Two and one-half months *before* its certification deadline, Wisper did. Clearly, Wisper has demonstrated the requisite good faith efforts to warrant a waiver of the February 21, 2019 deadline.

In its wisdom, the Commission knew that situations like Wisper's would arise. That is why it explicitly recognized that "waiver of the 180-day deadline would be appropriate if, for example, an entity has an ETC application pending with a state and the state's next scheduled meeting at which it would consider the ETC application will occur after the 180-day window."<sup>28</sup> Here, Wisper's ETC application, which was filed well over two months before the February 25, 2019 deadline, is still pending – through no fault of Wisper. Thanks to Conexon's request that additional weeks be added to the OCC hearing schedule, and its continuing efforts to litigate

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<sup>26</sup> The supplements were filed on April 26, 2019 and May 9, 2019.

<sup>27</sup> See Dillon Testimony. Several months of additional delays stemmed from OCC staff's verification that all of the census blocks were located in price cap carrier Study Areas. That process concluded in May.

<sup>28</sup> *Connect America Fund*, 31 FCC Rcd 5949, 6002 (¶152) (2016).

issues “unquestionably outside the scope of the intervention granted to Conexon,”<sup>29</sup> approval of the application has been delayed. However, a hearing is now set for July 11, with an ETC designation order expected to be signed at the first OCC meeting occurring after the hearing.

Conexon seeks to box in the Bureau by suggesting that the facts underlying the Bureau’s waiver grant in *Skybeam* are distinguishable and therefore compel a contrary result.<sup>30</sup> But the Bureau’s holding in *Skybeam* was predicated, at least in part, on the applicant’s exercise of due diligence in navigating state ETC processes that became delayed – the same set of circumstances present here. Conexon’s argument does not hold water.

This is confirmed by the Bureau’s recent grant of a waiver of the ETC certification deadline to Plains Internet, LLC (“Plains Internet”), a CAF auction winner that filed its ETC application on December 3, 2018, just two weeks before Wisper filed its Oklahoma ETC application. Plains Internet demonstrated that the basis for its filing on that date was a lack of understanding that the state had ETC jurisdiction. The Bureau made clear that “Plains Internet acted diligently in attempting to obtain its ETC designation prior to the deadline” and “[t]he late-filing of this ETC application did not delay the Commission’s long-form application review process or the provision of voice and broadband services to consumers living in the areas where the long-form applicant was awarded support.”<sup>31</sup> The Bureau can make the same finding here. Commission staff has not completed its review of Wisper’s extensive long-form application, which includes more than 80,000 locations in six states. Wisper is responding quickly to ongoing staff requests for information. It may also be true that the Commission will wait until

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<sup>29</sup> PUD’s Motion to Strike at 2 (¶4).

<sup>30</sup> Opposition at 15-16.

<sup>31</sup> Public Notice, “*Connect America Fund Phase II Auction Support for 611 Winning Bids Ready to be Authorized*,” AU Docket No. 17-182 & WC Docket No. 10-90, DA 19-535 (rel. June 7, 2019), at 2 (citation omitted).

Conexon’s Missouri appeal is resolved before awarding support. And, as the Commission is well aware, many CAF auction winners’ long-form applications remain subject to ongoing staff review. So, whether Wisper filed its Oklahoma ETC application by September 27, 2018 or on December 17, 2018, it cannot be said that the late filing of the Oklahoma ETC application delayed the Commission’s long-form review process. Wisper should be afforded the same relief as Plains Internet.

With its generalized animus toward Wisper, Conexon has lost sight entirely of the benefits of waiving the deadline – the deployment of broadband service to unserved areas. In considering requests for waiver, the Commission may “take into account considerations of . . . more effective implementation of overall policy on an individual basis.”<sup>32</sup> Nothing positive can come of denying the Petition. Wisper is diligently prosecuting its ETC application before the OCC, and OCC staff has twice recommended approval. Wisper will expeditiously submit proof of its ETC certification to the Commission as rapidly as OCC resolution of Conexon’s myriad of frivolous and time-consuming allegations are disposed of by the OCC. After that, Wisper can begin the important task of deploying broadband service to thousands of underserved consumers in Oklahoma.

### **III. CONEXON’S ATTEMPT TO INTRODUCE IRRELEVANT ARGUMENTS UNRELATED TO WISPER’S OKLAHOMA ETC APPLICATION SHOULD BE STRICKEN**

In its last act of desperation, Conexon strays far from the waiver proceeding to introduce circumstances involving ETC applications in other states that are wholly irrelevant to anything related to Wisper’s Oklahoma ETC application. First, the Commission lacks authority to declare Wisper in default of its *state* obligations in Kansas – only the State of Kansas can do that.

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<sup>32</sup> *Lifeline and Link Up Reform and Modernization*, DA 18-289 (¶6) (WCB 2018).



Besides, Wisper made clear in a response to a staff request for information that Wisper would be providing 100 Mbps download/20 Mbps upload speeds in Kansas. Further, declaring Wisper in default for not correcting the broadband speeds it has committed to provide – which is a matter of record before the Commission and subject to official notice in Kansas – would punish the unserved rural consumers of Kansas by removing CAF support. Apparently, Conexon would rather see that unjust and injurious result than privately suggesting to Wisper that its ETC application may contain an error.

Second, Conexon's pending appeal of Wisper's Missouri ETC certification is of no relevance here, as even Conexon must know given that is not asking the Commission for any relief. Rather, Conexon just re-hashes its arguments which the appellate court will resolve. Its sole purpose in raising these issues here can only be to try to denigrate Wisper. But Wisper already disclosed the existence of Conexon's appeal in a supplement to the Petition filed April 26, 2019. What Wisper stated there bears repeating given Conexon's continuing disingenuous efforts:

Conexon's basis for contesting ETC applications in states where it does business center on its mistaken belief that WISPs and satellite providers should not be granted ETC authority due to a supposed inherent lack of technical capabilities – a re-litigation of issues the FCC resolved in 2016 by adopting CAF II rules and procedures based on functionality and performance rather than technology. Conexon's brazen attempts to ignore this long-resolved fact by taking its frivolous case to the OCC will be successful only in delaying Wisper's ability to receive CAF II funds and deploy service to rural areas of Oklahoma.

In sum, the Bureau should reject Conexon's efforts to taint Wisper with irrelevant arguments. Rather, the Bureau should consider the liberties that Conexon takes with the Commission's procedural rules and requirements, Conexon's own harassment of Wisper, and the good cause showing that Wisper has made consistent with other ETC deadline waiver cases.

## Conclusion

Conexon's arguments do not improve with repetition, underscoring or bold font, regardless of the forum. As a non-bidder in the CAF auction without standing and without any alleged injury, it is perplexing why Conexon believes that it must use the Commission's processes to rant and rave about issues that, even if true, should not result in denial of the Petition and the corresponding absence of support to 2,443 locations in 51 census blocks. Conexon would gain no benefit, other than the perverse satisfaction of knowing that it successfully blocked millions of dollars of support from entering the state.

Respectfully submitted,

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June 26, 2019

*Its Attorneys*

## **EXHIBIT A**

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

JWK  
IN THE MATTER OF THE APPLICATION OF )  
WISPER ISP, INC. FOR A CERTIFICATE OF ) CAUSE NO. PUD 201900005  
CONVENIENCE AND NECESSITY TO )  
PROVIDE RESOLD AND FACILITIES-BASED ) ORDER NO. **697887**  
LOCAL EXCHANGE, INTEREXCHANGE AND )  
DATA TELECOMMUNICATIONS SERVICES )  
WITHIN THE STATE OF OKLAHOMA )

**FINAL ORDER GRANTING**  
**CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Corporation Commission ("Commission") of the State of Oklahoma being regularly in session and the undersigned Commissioners present and participating, there comes on for consideration and action the Application and Amended Application of Wisper ISP, Inc. ("Wisper" or "Applicant"), seeking a Certificate of Convenience and Necessity ("CCN") authorizing it to provide competitive local exchange, interexchange, and data telecommunications services on a facilities-based and resold basis within the State of Oklahoma, with an initial service territory limited to the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma and Valor Telecommunications of Texas L.P. d/b/a Windstream Communications Southwest, in accordance with Oklahoma Administrative Code ("OAC") 165:55 and 165:56.

**I. PROCEDURAL HISTORY**

1. On February 1, 2019, Wisper filed an Application with the Commission seeking the issuance of a CCN authorizing it to provide competitive local exchange, interexchange, and data telecommunications services on a facilities-based and resold basis within the State of Oklahoma; the initial service territory requested by Wisper in the Application was incorrect and was later amended in its Amended Application filed on May 22, 2019.
2. On April 18, 2019, Wisper filed a Motion for Protective Order, along with a Notice of Hearing setting that Motion before an Administrative Law Judge ("ALJ") on April 25, 2019. The ALJ heard and recommended the Motion on that date. On May 8, 2019, the Commission issued Order No. 695783 granting Wisper's Motion for Protective Order.
3. On May 22, 2019, Wisper filed its Amended Application, which clarified the exchanges to be included in Wisper's initial service territory, which includes an initial service territory limited to the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma and Valor Telecommunications of Texas L.P. d/b/a Windstream Communications Southwest.
4. On May 22, 2019, a Proof of Publication was filed regarding publication of notice in the *McCurtain Gazette*, *Durant Democrat*, *Tulsa World*, *The Oklahoman*, *Altus Times*, *The Daily Ardmoreite*, and *Guymon Daily Herald* newspapers.<sup>1</sup>

<sup>1</sup> See Cause No. PUD 201000012 Order No. 574330.

5. No objections to the Application were filed. PUD reviewed the Application and Amended Application and determined that Wisper met the qualifications for certification as a telecommunications service provider as set forth in Commission rules. PUD recommends the Commission issue an order granting a CCN authorizing Wisper to provide competitive local exchange, interexchange, and data telecommunications services on a facilities-based and resold basis within the State of Oklahoma, with an initial service territory limited to the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma and Valor Telecommunications of Texas L.P. d/b/a Windstream Communications Southwest.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following finding of facts and conclusions of law:

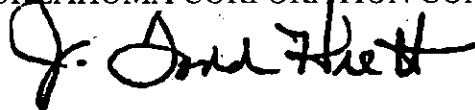
1. The Commission has jurisdiction over the subject matter and persons. Notice was given as required by law and the rules of the Commission. Authority to grant the Application arises under OKLA. CONST. art. IX, § 18, and 17 O.S. §§ 131 *et seq.*
2. Wisper seeks to provide competitive local exchange, interexchange, and data telecommunications services on a facilities-based and resold basis within the State of Oklahoma, with an initial service territory limited to the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma and Valor Telecommunications of Texas L.P. d/b/a Windstream Communications Southwest.
3. Wisper provided the Commission with all the information and documents required by the Commission.
4. Wisper demonstrated that it possesses sufficient technical, managerial and financial ability to provide the requested telecommunications services and complied with the requirements of OAC 165:55-3-1 and 165:56-3-1.
5. Wisper published notice of the Application once a week for two (2) consecutive weeks in those newspapers of general circulation reasonably calculated to inform telephone service providers and interested persons throughout the State of Oklahoma of Applicant's request for statewide authority and, therefore, has satisfied the requirements of 17 O.S. § 132.
6. No objection to the Application has been filed.
7. Wisper has satisfied all requirements prescribed by Commission rules relating to the issuance of a CCN under OAC 165:55 and 165:56.
8. Any future changes to Wisper service territory will comply with OAC 165:55-17-3.
9. Wisper will file its initial tariff in accordance with OAC 165:55-3-3 and OAC 165:56-5-1.

### III. ORDER

THE COMMISSION THEREFORE ORDERS consistent with the above findings of fact and conclusions of law, that the Application, as amended, of Wisper ISP, Inc. for a Certificate of Convenience and Necessity, authorizing Wisper ISP, Inc. to provide competitive local exchange, interexchange, and data telecommunications services on a facilities-based and resold basis within the State of Oklahoma, with an initial service territory limited to the exchanges served by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma and Valor Telecommunications of Texas L.P. d/b/a Windstream Communications Southwest, and a Certificate of Convenience and Necessity is hereby granted.

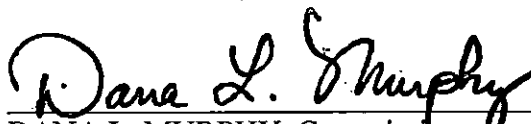
THE COMMISSION FURTHER ORDERS Wisper ISP, Inc. shall file its initial tariff in accordance with OAC 165:55-3-3 and OAC 165:56-5-1.

OKLAHOMA CORPORATION COMMISSION



J. TODD HIETT, Chairman

BOB ANTHONY, Vice-Chairman



DANA L. MURPHY, Commissioner

**DONE AND PERFORMED** by the Commissioners participating in the making of the above and foregoing Final Order, as shown by their signatures above, this 18 day of

June, 2019  
[SEAL]

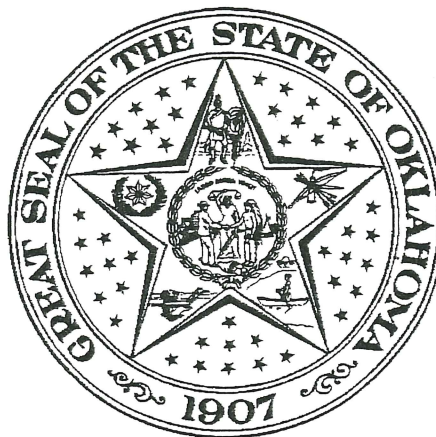


PEGGY MITCHELL, Commission Secretary

## **EXHIBIT B**

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

WISPER ISP INC. APPLICATION FOR DESIGNATION )  
AS AN ELIGIBLE TELECOMMUNICATIONS )  
CARRIER FOR PURPOSES OF RECEIVING )  
FEDERAL UNIVERSAL SERVICE SUPPORT FROM ) CAUSE NO. PUD 201800154  
THE FCC CONNECT AMERICA FUND - PHASE II )



**FILED**  
JUN 25 2019  
COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

SUPPLEMENTAL TESTIMONY OF

JENNY DILLON

FOR

PUBLIC UTILITY DIVISION

June 25, 2019



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1 INTRODUCTION

2 Q: Please state your name and your business address.

3 A: My name is Jenny Dillon. My business address is the Jim Thorpe Office Building, Room  
4 580, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

5 Q: By whom are you employed and in what capacity?

6 A: I have been employed by the Public Utility Division ("PUD") of the Oklahoma Corporation  
7 Commission ("OCC" or "Commission") as a Regulatory Analyst since March 2016.

8 Q: Have you previously testified before the OCC, and were your credentials accepted?

9 A: Yes.

10 Q: Have you previously filed testimony in this Cause?

11 A: Yes. I filed Responsive Testimony on May 29, 2019.

12 PURPOSE

13 Q: What is the purpose of your supplemental testimony regarding this Application filed  
14 by Wisper ISP, Inc.?

15 A: The purpose of this testimony is to supplement my Responsive Testimony filed on May  
16 29, 2019, which indicated that Wisper ISP, Inc.'s ("Wisper") application for a Certificate  
17 of Convenience and Necessity ("CCN") in Cause No. PUD 201900005 was still pending  
18 at the Commission without a final order. That application is no longer pending. Order No.  
19 697887 in Cause No. PUD 201900005 was issued by the Commission on June 18, 2019,  
20 granting CCN authority to Wisper.

21 Additionally, I would like to correct a scrivener's error included in my Responsive  
22 Testimony filed on May 29, 2019. In my Responsive Testimony, page 5, line 3, 47 C.F.R.

§ 54.201 is cited twice. The testimony should instead cite 47 C.F.R. § 54.201 and 47 C.F.R. § 54.202.

## BACKGROUND

Q: Has Wisper met the requirements for ETC Designation at 47 U.S.C. § 214(e) and 47 C.F.R. § 54.201?

A: Yes. Wisper, through the grant of the CCN in Order No. 697887, adequately established its status as a common carrier in Oklahoma.

## RECOMMENDATION

**Q: What is PUD's recommendation in this Cause?**

A: Based on PUD's analysis of the Application, Amended Applications, discovery responses, and supporting affidavit, along with the significant requirements and obligations that are inherent in the FCC's CAF II process, Wisper has currently met all of the requirements for designation as an ETC within the areas requested for purposes of receiving the federal high cost and low income universal service support for which it is eligible. PUD recommends that Wisper should be granted ETC designation for the requested areas.

I state, under penalty of perjury under the laws of Oklahoma, that the foregoing is true and correct to the best of my knowledge.

(Signature)

June 25, 2019 Oklahoma City, Oklahoma

CERTIFICATE OF SERVICE

This is to certify that on June 25, 2019, a true and correct copy of the above and foregoing was sent via electronic mail and/or United States Postal Service, postage fully prepaid thereon to the following interested parties:

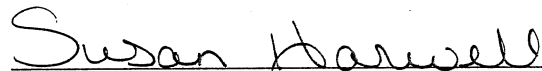
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OKLAHOMA CORPORATION COMMISSION

## **EXHIBIT C**

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

Wisper ISP Inc. )

)  
) Docket No. PUD 201800154

)  
) Application for Designation as an Eligible  
) Telecommunications Carrier for Purposes of  
) Receiving Federal Universal Service Support  
) From the FCC Connect America Fund  
) – Phase II )

**FILED**  
JUN 25 2019

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION

**PUD'S MOTION TO STRIKE CERTAIN PORTIONS OF THE TESTIMONY OF  
JONATHAN CHAMBERS**

COMES NOW Brandy L. Wreath, Director of the Public Utility Division ("PUD" or "Applicant") of the Oklahoma Corporation Commission ("Commission") by and through the undersigned counsel requests an order striking certain portions of the testimony of Jonathan Chambers, filed on May 29, 2019, on behalf of Conexon, LLC ("Conexon"). In support of its Motion, PUD hereby states as follows:

1. On April 9, 2019, Conexon was granted the authority to intervene in Cause No.

PUD 201800154 in Commission Order. No. 694275 on a limited basis. The order stated:

THE COMMISSION FURTHER FINDS that in accordance with OAC 165:5-9-4, Conexon's participation as an intervenor will not include litigation of matters regarding the CAF-II funding process or award selection previously decided by the Federal Communications Commission.

2. In the Testimony of Jonathan Chambers, filed on May 29, 2019, Mr. Chambers far exceeded the scope of the intervention authority granted to Conexon under Order No. 694275, and attempted to re-litigate its motion for intervention in this Cause.

3. Beginning with the question at the bottom of page 2 and through the middle of page 4<sup>1</sup>, Mr. Chambers argues that the limitation placed on the intervention of Conexon was unfounded. He states that "the assertions and actions in this proceeding misconstrue the

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<sup>1</sup> The witness did not provide line numbers in his prefiled testimony.

*PUD's Motion to Strike Certain Portions of the Testimony of Jonathan Chambers*

regulatory scheme intended by Congress and the FCC.” Additionally, Mr. Chambers stated on page 4 of his testimony that Conexon should have been allowed to fully examine the ability of Wisper ISP, Inc. (“Wisper”) to provide supported services. The scope of the intervention has already been decided in Commission Order No. 694275, and the attempt to re-litigate that issue through testimony on page 2 through 4 of Mr. Chambers’ testimony should be stricken.

4. Mr. Chambers’ testimony beginning at page 5 through page 10 contains testimony which is unquestionably outside the scope of the intervention granted to Conexon. Again, Order No. 694275 states that “Conexon’s participation as an intervenor will not include litigation of matters regarding the CAF-II funding process or award selection. . .” This section of Mr. Chambers’ testimony provides endless speculation as to whether Wisper is capable of meeting technical and operational requirements and milestones previously established by the FCC under the processes and procedures for its CAF II Auction 903.<sup>2</sup> This testimony is squarely outside the scope of the intervention granted to Conexon.

5. The scope of the review in this Cause is guided by OAC 165:55-23-2 along with applicable federal rules found at 47 U.S.C. § 214(e), 47 C.F.R. § 54.101, 47 C.F.R. § 54.201, 47 C.F.R. § 54.202, and 47 C.F.R. § 54.207. Those rules provide PUD with specific factors to determine if ETC designation should be granted. The testimony requested to be stricken herein raises issues and topics completely and uniquely addressed by the FCC in its processes for the 903 Auction<sup>3</sup> and is not within the scope of review required under those ETC designation rules.

6. PUD objected to the intervention of Conexon in this case for a variety of reasons, one of the main reasons being that the basis for Conexon’s intervention is driven by a desire to

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<sup>2</sup> See, Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903, FCC 18-6, released February 1, 2018 (“*FCC Auction 903 Requirements and Procedures*”)

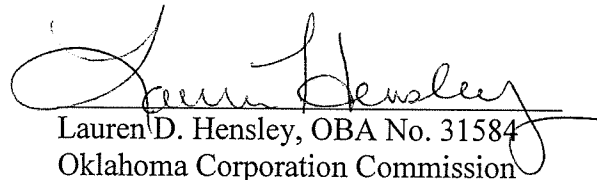
<sup>3</sup> *Id.*

*PUD's Motion to Strike Certain Portions of the Testimony of Jonathan Chambers*

litigate the legitimacy of the FCC's selection of Wisper as a CAF II winning bidder; however, this is not the province of the Commission, as the ALJ and Commissioners agreed in the Order Granting Motion for Intervention, and it is a waste of Commission resources. The FCC has devoted a great deal of time, resources, and expertise in order to ensure the legitimacy of its auction and to ensure that the winning bidders, and ultimately, CAF II funding recipients are technically and operationally capable of meeting the obligations to which they committed in the 903 Auction process. Again, it is not this Commission's role to second guess or otherwise re-create the analysis and process established and administered by the FCC.

WHEREFORE, PUD respectfully requests that the testimony of Jonathan Chambers beginning at the bottom of page 2, continuing through the middle of page 4 and the testimony beginning at page 5 continuing through page 10 be stricken.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lauren D. Hensley", written over a horizontal line.

Lauren D. Hensley, OBA No. 31584  
Oklahoma Corporation Commission  
Assistant General Counsel  
Judicial and Legislative Services Division  
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CERTIFICATE OF ELECTRONIC SERVICE

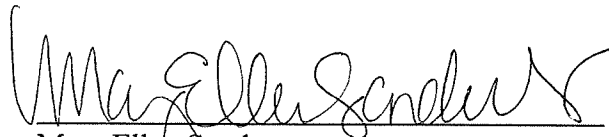
I, the undersigned, do hereby certify that on the 25<sup>th</sup> day of June, 2019, a true and correct copy of the above and foregoing was sent electronically to:

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Mary Ellen Sanders

**CERTIFICATE OF SERVICE**

I, Genevieve F. Edmonds, hereby certify that a true and correct copy of the foregoing  
“Reply of Wisper ISP, Inc. to Opposition of Conexon, LLC to Petition for Waiver of Deadline  
for ETC Designation,” was sent by first-class postage prepaid mail this 26th day of June, 2019 to  
the following:

Jonathan Chambers  
Partner  
Conexon, LLC  
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Kansas City, MO 64108

Michael Romano  
Senior Vice President – Industry Affairs & Business Development  
NTCA – The Rural Broadband Association  
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Arlington, VA 22203

/s/ Genevieve F. Edmonds  
Genevieve F. Edmonds